Federal Communications Commission
Washington, D.C. 20554

March 26, 2008

DA 08-712
Released: March 26, 2008
In Reply Refer to:
1800B3-TSN

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In re: **AM Broadcast Auction No. 84**

Teresa Prieto
WPLO(AM), Grayson, Georgia
Facility ID No. 8066
File No. BMJP-20041029AEY

Petition for Reconsideration

Dear Ms. Prieto:

This letter refers to the above-referenced Petition for Reconsideration ("Petition"), filed May 30, 2007, by Teresa Prieto ("Prieto"). In that letter, Prieto seeks reconsideration of the Audio Division's April 30, 2007, letter decision denying her application for major modification to the facilities of station WPLO(AM), Grayson, Georgia, seeking to change the community of license from Grayson to Lawrenceville, Georgia.[1] For the reasons set forth below, we deny the Petition.

Background. Prieto timely filed her FCC Form 175 application to change the WPLO(AM) community of license during the filing window for AM Auction No. 84 ("Auction 84").[2] The application was determined not to be mutually exclusive with any other proposal filed in the Auction 84 filing window, and Prieto was invited to file her complete FCC Form 301 application by October 29, 2004.[3] Prieto timely filed her complete FCC Form 301 application on October 29, 2004 (the "Application"), proposing only a change in community of license to Lawrenceville, Georgia (2000 Census population 22,397), with no change to the WPLO(AM) technical facilities. Prieto was thereafter instructed to submit an amendment addressing the implications of the proposed community change under Section 307(b) of the Communications Act of 1934, as amended, which directs the Commission to make a "fair, efficient,

[1] *Ms. Teresa Prieto*, Letter, 22 FCC Rcd 8379 (MB 2007) ("*Staff Decision*").

[2] *See AM New Station and Major Modification Auction Filing Window; Minor Modification Application Freeze*, Public Notice, 18 FCC Rcd 23016 (MB/WTB 2003).

[3] *See AM Auction No. 84 Singleton Applications*, Public Notice, 19 FCC Rcd 16655 (MB 2004).

and equitable" distribution of radio service among communities in the United States.[4] Prieto timely filed her Section 307(b) amendment on July 13, 2005.

WPLO(AM) is the sole local transmission service licensed at Grayson, Georgia (2000 Census population 765). Because the Commission prohibits the removal of a community's sole local transmission service absent an appropriate waiver showing, the staff dismissed the Application in the *Staff Decision*. Prieto timely filed the Petition.

Discussion. Prieto challenges the staff's dismissal of the Application, arguing that if the Commission cannot grant the Application it must set it for hearing. As discussed below, this is not the case.

Prieto advances several rationales in support of her Petition. First, she contends that the policy prohibiting removal of sole local service was not specifically stated as applying to AM major modification applications, and thus cannot be applied to her Application.[5] Second, Prieto states that the most recent Commission order re-affirming the prohibition on removal of sole local service does not apply to her, both because it post-dates her Application and because she alleges that she has made a sufficient showing for waiver of the policy.[6] Next, she claims there is "no rule prohibiting" the community of license change she requests, merely a "so-called 'policy presumption.'"[7] She further attempts to distinguish the *Potts Camp and Saltillo, Mississippi* case,[8] cited in the *Staff Decision*, noting that it was decided in an FM rulemaking proceeding rather than an AM application case, and further notes that the population differential between her current and proposed community is far greater than that of the two communities in *Potts Camp*. Finally, Prieto contends that Section 309(e) of the Communications Act of 1934, as amended (the "Act")[9] "clearly speaks" to the issue at hand. Specifically, she claims that the language of Section 309(e) requires that a hearing be held if "the Commission for any reason is unable" to find that the public interest will be served by grant of the Application.[10]

We reject both Prieto's substantive and procedural arguments. Nothing in the *New Community MO&O*, in which the sole local service prohibition was most definitively described, limits that policy to removal of sole local FM and TV services. Indeed, the heading to that section of the order labels it an "*Absolute* Restriction on Removal of Sole Existing Local Transmission Service."[11] Moreover, the

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[4] 47 U.S.C. § 307(b). *See Section 307(b) Amendment Deadline Established for Certain AM Auction No. 84 Singleton Applications*, Public Notice, 20 FCC Rcd 10710 (MB 2005).

[5] *See Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License,* Memorandum Opinion and Order, 5 FCC Rcd 7094, 7097 and n.16 (1990) ("*New Community MO&O*").

[6] Petition at 8-9.

[7] *Id*. at 5.

[8] Memorandum Opinion and Order, 16 FCC Rcd 16116 (2001) ("*Potts Camp*").

[9] 47 U.S.C. § 309(e).

[10] Petition at 4.

[11] *Id*. at 7096 (emphasis added).

Commission states that the policy barring removal of sole local service "furthers our statutory mandate" under Section 307(b) of the Act.[12] As Prieto herself observes, "the Commission must follow the clear dictates of its enabling statute."[13] Section 307(b) requires the Commission to provide for the fair, efficient, and equitable distribution of "licenses, frequencies, hours of operation, and of power," without limiting same to a particular service.[14]

Further, Prieto's interpretation of the prohibition is untenable. As the Commission noted in the *New Community MO&O*, AM and FM stations have long been considered to be "joint components of a single aural medium."[15] Prieto's interpretation would constitute a significant departure from this policy, allowing sole local AM stations to abandon their communities of license for any reason or none. Moreover, we note that Prieto's interpretation is inconsistent with FM allocations policy, which permits an FM station to change communities when a sole AM station remains in its former community of license.[16] If, as Prieto suggests, AM stations could change communities with impunity, an AM station could never be considered the "sole local service" for purposes of such a re-allotment.[17] Prieto likewise errs when she states that the prohibition against removal of sole local transmission service was first applied to AM stations in the Commission's 2006 community of license change order.[18]

Additionally, Prieto's contention that the prohibition on removing sole local service is not a rule, and thus no waiver is necessary, is belied by the very language of the *New Community MO&O*. "While we continue to believe that a prohibition on the removal of local service is justified because such changes presumptively disserve the public interest, we also wish to clarify that, in the rare circumstances where removal of a local service might serve the public by, for example, providing a first reception service to a significantly sized population, *we will entertain requests to waive the prohibition*."[19] Moreover, the

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[12] 47 U.S.C. § 307(b).

[13] Petition at 4.

[14] 47 U.S.C. § 307(b).

[15] *New Community MO&O*, 5 FCC Rcd at 7097. *See also Revision of FM Assignment Policies and Procedures*, Second Report and Order, 90 FCC2d 88, 92 (1982) ("*FM Assignment Policies*").

[16] *See*, *e.g.*, *Saltville, Virginia and Jefferson, North Carolina*, Report and Order, 10 FCC Rcd 7578 (MMB 1995); *Kindred and Oakes, North Dakota*, Report and Order, 7 FCC Rcd 1996 (MMB 1992). *See also New Community MO&O*, 5 FCC Rcd at 7097 (both AM and FM stations considered in a proceeding to change an FM community of license).

[17] We also reject Prieto's argument that note 16 to the *New Community MO&O* supports her claim that the prohibition against removal of sole local transmission service does not apply to the AM service. Such an interpretation is possible when one cites only the first part of the note, as did Prieto. Read as a whole, the note stands for the proposition that both vacant FM allotments and unbuilt AM, FM, and TV permits can be considered "existing service" in certain contexts. It is not meant to limit the application of the sole local transmission service prohibition to FM and TV stations only.

[18] *Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services*, Report and Order, 21 FCC Rcd 14212, 14227-30 (2006). *See David A. O'Connor*, Letter, 20 FCC Rcd 17175 (MB 2005); *Americom*, Hearing Designation Order, 8 FCC Rcd 2499 (MMB 1993) (designating issue as to whether relocation of AM station that was sole local transmission service comported with Section 307(b) of the Act). *See infra* note 23.

[19] *New Community MO&O*, 5 FCC Rcd at 7096 (emphasis added).

policy has the hallmarks of a rule: it is an agency statement of general applicability and future effect designed to implement, interpret, or prescribe law or policy or describe the procedure or practice requirements of the agency, adopted in a rulemaking proceeding and published in the Federal Register.[20] The mere fact that the policy does not appear in the Code of Federal Regulations does not preclude its being considered a rule.[21] Moreover, we disagree with Prieto's contention that she provided sufficient justification to warrant waiver of the policy. As noted in the *Staff Decision*, Prieto's proposal to relocate WPLO(AM) to a larger community – even a much larger community – is not a special circumstance justifying removal of Grayson's sole local transmission service.[22]

Finally, and perhaps most importantly, there is no reason to hold a hearing where, as here, there is no dispute as to the facts of the case. Prieto does not dispute that WPLO(AM) is Grayson, Georgia's sole local service, nor does she dispute any other material facts. In such cases, no hearing is required.

> There is a difference between "substantial issues" which require a hearing to elucidate the controlling factors . . . and issues such as involved here. The latter may be just as important as the former, but unless they depend on unresolved factual circumstances, no hearing is required to resolve them. *Only where the public interest cannot be determined without a resolution of disputed facts has Congress dictated that the Commission must conduct a hearing. That is the clear meaning of section 309 of the Act.* (47 U.S.C. §§ 309(d)(2) *and (e)* (1964).) (cite) Without hesitation we hold that the Commission was not required to hold a hearing before deciding the questions raised by [the] petition;

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[20] *See Bowen v. Georgetown University Hospital*, 488 U.S. 204, 218-19 (1988) (Scalia, J., concurring) ("Rule making is agency action which regulates the future conduct of either groups of persons or a single person; it is essentially legislative in nature, not only because it operates in the future but also because it is primarily concerned with policy considerations."). *See also Radio Broadcasting Services; Modification of FM and TV Authorizations to Specify a New Community of License,* 54 Fed. Reg. 26199, 26200 (1989).

[21] *See*, *e.g.*, *Cellnet Communications, Inc*., Memorandum Opinion and Order, 9 FCC Rcd 3341, 3343 and n.33 (CCB 1994) (citing *Cellnet Communications v. FCC*, 965 F.2d 1106, 1108 (D.C. Cir. 1992)) (Commission's cellular resale requirement is a "binding, uncodified, substantive rule adopted through notice and comment rulemaking"); *Amendment of the Television Table of Allotments to Delete Noncommercial Reservation on Channel *16, 482-488 MHz, Pittsburgh, Pennsylvania*, Report and Order, 17 FCC Rcd 14038, 14055 and n.58 (2002) (considering request for waiver of uncodified rule requiring that newly de-reserved noncommercial educational television channels be made available for competing applications).

[22] *Staff Decision*, 22 FCC Rcd at 8381. *See also Northeast Cellular Telephone Co. v. F.C.C.,* 897 F.2d 1164, 1166 (D.C. Cir. 1990) ("*Northeast Cellular*") ("[A] waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest."). In this regard, we reject Prieto's attempt to distinguish *Potts Camp* because the proposed community in that case was only four times larger than the current community, whereas Lawrenceville is over 20 times as large as Grayson. *See* Petition at 5-7. *Potts Camp* was cited solely for the proposition that a move to a larger community, no matter how much larger, does not of itself justify removal of sole local service. Prieto's attempt to re-frame the issue as a question of the degree of difference in community populations is misplaced. We likewise reject Prieto's assertion that the controlling factor in *Potts Camp* was the fact that removal of the sole local service would also drastically reduce local reception service. *Id*. at 6-7. *Potts Camp* emphasized the importance of transmission service to a community, and was cited as such. It does not stand for the proposition that removal of sole local service is allowed when the population differential is sufficiently large, or when the current community will retain abundant reception service, as Prieto argues.

considering the facts that the Commission had before it, "nothing suggests to us that a further hearing would produce additional facts that might change the result."[23]

Thus, we find the matter was correctly decided in the *Staff Decision*, and moreover that no hearing is necessary to determine whether grant of the application would be in the public interest, convenience, and necessity. Accordingly, Prieto's Petition for Reconsideration IS DENIED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

[23] *Marsh v. FCC*, 436 F.2d 132, 136 (D.C. Cir. 1970) (emphasis added) (citing *Capitol Broadcasting Co. v. FCC*, 324 F.2d 402, 405 (D.C. Cir. 1963)). In *Americom*, *supra* note 18, the Bureau's predecessor bureau designated the issue of removal of a sole local service AM station for hearing. 8 FCC Rcd at 2500. We note that, in *Americom*, there was also a disputed factual issue as to whether a transmitter site was available to the applicant from which it could serve its current community of license, necessitating a hearing. *Id*. These issues were never resolved, as Americom withdrew its application before going to hearing. However, to the extent *Americom* can be read to require a hearing when no dispute exists as to the material facts, it is contrary to the court of appeals precedent cited herein, and is therefore disapproved.